

OECD「Discussion draft on Action 7 (Additional Guidance on the Attribution of Profits to Permanent Establishments) of the BEPS Action Plan (BEPS 行動計画 7 (PE 帰属利得に関する追加ガイダンス) に関する公開討議草案)」に対するコメント

2016年7月4日、経済協力開発機構（OECD）は標記討議草案を公表し、意見募集を開始した。本討議草案は、BEPS（Base Erosion and Profit Sifting: 税源浸食と利益移転）行動計画7で要請されているものである。

PEの閾値に関する作業の完了後、OECDは、2010年の帰属利益ルールであるOECD承認アプローチ（AOA）の更新が必要であるか検討を行っていたが、本討議草案は、それに関連している。本討議草案では、従属代理人の設例を4つ、固定的施設の設例（倉庫PE）1つの計5つの設例についてガイダンスを示しており、コメントを求めている。

経理委員会では、各国における共通したPEの定義解釈及び、運用を求め、従属代理人PEのケースにおいては、独立企業原則に基づく第9条の機能事実分析が行われている場合は重要な人的機能に基づく第7条による配分計算を不要とすることをガイドラインに明記すること等を総論として、各質問事項に関する意見を取り纏め、2016年9月2日、OECD宛提出した。

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2016年9月2日

The Tax Treaties, Transfer Pricing and Financial transactions Division  
Organisation for Economic Cooperation and Development

一般社団法人 日本貿易会  
経理委員会

**BEPS 行動 7 「Additional Guidance on the Attribution of Profits to Permanent Establishments」 に関する討議草案に対するコメント**

本レターは2016年7月4日付でリリースされた“Additional Guidance on the Attribution of Profits to Permanent Establishments”に対する一般社団法人日本貿易会（※）としてのコメントを貴会宛提出させていただくものである。

（※）一般社団法人日本貿易会は、日本の貿易商社及び貿易団体を中心とする貿易業界団体であり、その中で経理委員会は、各種税制に対する意見発信を、主な活動内容の一つとしている（末尾に当会経理委員会の参加会社を記載）。

## <全体的なコメント>

1. PE 概念の再定義が多国間協定で盛り込まれることが予定されている中、PE の定義の見直しを行う租税条約第 5 条の改定のみが反映され、PE 帰属所得の計算方法を規定する租税条約第 7 条について指針が提供されない場合には、第 7 条の適用に各国間の不整合や解釈上の差異が懸念されることから、予測可能性を担保する上で、今回の追加的指針に係る公開討議草案の公表を歓迎する。
2. PE 概念の再定義に伴い、PE と認定される範囲が拡大する中で、一部の国の課税当局による不当な PE 認定増加や二重課税リスクの高まりが懸念されるが、これに対し各国における共通した PE の定義解釈及び、運用を求める。
3. また、帰属所得計算に係る今回の公開討議草案で示された追加的指針においては、従属代理人 PE のケースに関し、重要な人的機能に基づく第 7 条の機能事実分析と、独立企業原則に基づく第 9 条の機能事実分析との間で一部著しい不整合が見られた。これらの機能事実分析は、どちらの分析においても契約関係及び経済的所有権が考慮されるべきであり、結果は整合すると考える。即ち、第 9 条により移転価格上の整理を行った結果適切な利益配分がなされる場合には、第 7 条で PE に追加的な帰属所得は発生しないと考える。従い、実際に夫々の分析で異なる結果が生じるケースは考え難い中、納税者と税務当局の双方にとって実務負担の増加が大いに懸念される為、従属代理人 PE のケースに於いては、第 9 条に基づく分析が行われている場合は第 7 条による配分計算を不要とすることをガイドラインに明記願いたい。
4. 更に、第 7 条による配分計算が必要となるケースに於いても、基本的には第 9 条による機能事実分析と同等の結果が許容されるべきであると考えますが、今般の草案に於いては明確にされていないため、その点については明らかにされたい。
5. 本検討をタイムリーに進め、多国間協定の署名に向けた公開までに合わせ、多国間協定又は多国間協定に関するコメントリーに、今回の追加的な指針の内容を適切に反映することを強く望む。

## <個別コメント>

### 【事例 1】

1. Commentators are invited to express their views on whether the order in which the analyses are applied under Article 9 of the MTC and the Article 7 of the MTC can affect the outcome, and what guidance should be provided on the order of application.

- 第 9 条に基づく機能事実分析により、移転価格上の整理が行われ、適切な利益配分がなされた場合には、第 7 条で PE に追加的な帰属所得は発生しないと考えており、計算不要

とすることを望む。

- 尚、今回の公開討議草案に対しては当該所得計算に絞ったコメントが求められている。一方で、公開討議草案の事例 1 に示されている取引に関し、現地の子会社は単に本社と顧客との間のサポート活動を行っているに過ぎず、何ら交渉は行っていない。このような場合 Sellco は補助的、準備的な業務を遂行しているとし、従属代理人 PE には該当しないものとする。

## 【事例 2】

6. Do commentators agree with the construction of the profits or losses of the DAPE in Example 2 under the AOA?

- 同意できない。
- 第 7 条に基づく機能事実分析においてのみ、重要な人的機能に基づき在庫・売掛債権の経済的所有権を従属代理人 PE に帰属させており、これらを Sellco に帰属させない第 9 条に基づく機能事実分析との差異が生じている。
- この点、第 7 条に基づく機能事実分析と第 9 条に基づく機能事実分析は整合すべきであるため、斯かる差異は生じるべきではない。即ち、資産保有に対する資金拠出のリターンである 2 は Prima 本社に帰属すべきであり、従属代理人 PE の帰属所得はゼロとなる。従い、従属代理人 PE のケースに於いては、重要な人的機能に基づくリスク及び資産の経済的所有権の配分を検討する必要はないと考える。
- 尚、本事例 2 では事例 1 より在庫や与信に関する機能について文言の若干の変化のみをもって「the contractual assumption of risk is not aligned with control of risk.」との前提の上で分析がなされているが、多少の機能リスクの違いがあったとしても悪戯に事例 2 に分類されることが無い点を確認願いたい。
- 例えば、①そもそも在庫リスクや信用リスクの重要性が低い場合、或いは、②Prima においても統合的なリスク管理機能が備わっており、形式的には Sellco が承認を行うが、Prima のリスク管理システムの下で Sellco が Prima に事前に承認を求めている（即ち、実質的には Prima がリスクの管理や契約の承認を行っている）場合においては、「the contractual assumption of risk is not aligned with control of risk.」とするのは適切ではないだろう。

9. What are your views on the fact that in Example 2 the same functions that are

considered under the Article 9 analysis to allocate risks to Sellco, are also taken into account, under Article 7, as the SPF that result in the attribution of economic ownership of assets to the DAPE? What is your opinion about the fact that, in this example, the inventory and credit risks are allocated to Sellco under Article 9 and the economic ownership of inventory and receivables are attributed to the DAPE? Does your reading of the current guidance of the 2010 Attribution of Profits Report, and in particular with paragraphs 230 to 245, support the conclusions of the Example?

- 質問 6 に対する回答を参照願いたい。

#### 【事例 4】

12. Do commentators agree with the construction of the profits or losses of the DAPE in Example 4 under the AOA?

- 同意できない。
- 第 7 条に基づく機能事実分析においては、重要な人的機能に着目し、第 9 条に基づく機能事実分析とは全く異なる計算方法でのリスク配分が行われた結果、従属代理人 PE に追加的な与信リスク及び売掛債権の経済的所有権が配分されている。これにより、第 7 条に基づく Prima 本社と従属代理人 PE の間の所得配分は、第 9 条に基づく Prima と Sellco の間の所得配分と全く異なる結果となっている。
- この点、第 7 条に基づく機能事実分析と第 9 条に基づく機能事実分析は整合すべきであるため、斯かる差異は生じるべきではない。即ち、第 7 条に基づく機能事実分析と第 9 条に基づく機能事実分析におけるリスク配分は整合するため、従属代理人 PE の帰属所得はゼロとなる。従い、従属代理人 PE のケースに於いては、重要な人的機能に基づくリスク及び資産の経済的所有権の配分を検討する必要はないと考える。

13. Do commentators agree that the profits or losses in the DAPE over and above the fee payable to Sellco arise because the contractual allocation of risk to Prima is respected under Article 9, and is not shared with Sellco, whereas under Article 7 the risk is partly attributed to Prima's Head Office and partly to the DAPE of Prima? In other words, the difference arises from differences between allocation of risk between two separate enterprises and attribution of risk within the same enterprise?

- 質問 12 に対する回答を参照願いたい。

以 上

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**The Tax Treaties, Transfer Pricing and Financial transactions Division**  
Organisation for Economic Cooperation and Development

Accounting & Tax Committee  
Japan Foreign Trade Council, Inc.

**Comments on Discussion Draft on Action 7 of the BEPS Action Plan (Additional  
Guidance on the Attribution of Profits to Permanent Establishments)**

The following are the comments of the Accounting & Tax Committee of the Japan Foreign Trade Council, Inc. (JFTC) in response to the invitation to public comments by the OECD regarding the “Discussion Draft on Additional Guidance on the Attribution of Profits to Permanent Establishments” released on July 4<sup>th</sup>, 2016.

The JFTC is a trade-industry association with Japanese trading companies and trading organizations as its core members. One of the main activities of JFTC’s Accounting & Tax Committee is to submit specific policy proposals and requests concerning tax matters. Member companies of the JFTC Accounting & Tax Committee are listed at the end of this document.

**General Comments**

1. While the redefinition of PE concept is scheduled to be reflected in the Multilateral Instrument, if only changes to the PE definition in Article 5 is to be reflected without any additional guidance on the attribution of profits to PE specified in Article 7, we are concerned that various countries will apply inconsistently the provisions and interpretation of Article 7 in calculating income attributable to PE. Therefore, as a means of securing predictability for taxpayers, we welcome the initiative of OECD by releasing the “Discussion Draft on the Additional Guidance on the Attribution of Profits to Permanent Establishments”.
2. Redefining the PE concept will result in lowering the PE threshold and, consequently, may cause concerns towards increased disputes over which a further PE is recognized unjustly by tax authorities in some countries and increased risk of incurring double

taxation. We therefore request OECD to take initiative to provide further guidance under which a common interpretation rules on the PE status is appropriately implemented and operated by all the participating countries.

3. In addition, in the additional guidance on the attribution of profits to dependent agent PE (DAPE) in the Discussion Draft, considerable inconsistency can be seen between the two analyses (i.e., the functional and factual analysis under Article 7 based on significant people functions and the functional and factual analysis under Article 9 based on arm's length principle). However, we believe that, in either analysis, the contractual relationship and the economic ownership should be considered, and the outcome from the analysis should be consistent with each other. In other words, if the profits are allocated appropriately through the functional and factual analysis under Article 9, there should be no additional income attributable to PE under Article 7. Considering that it is highly unlikely that each analysis reaches a different conclusion, a massive increase of the administrative burden could be a serious concern for both taxpayers and tax authorities. Therefore, in calculating income attributable to DAPE, we would strongly request OECD to explicitly state in the guidance that the additional analysis under Article 7 is unnecessary as long as analysis under Article 9 has been performed appropriately.
4. In addition, even in a case where the calculation of attribution under Article 7 is necessary, we believe that the same results of the functional and factual analysis under Article 9 are to be accepted. This point cannot be clearly seen in the Discussion draft, therefore we request OECD to state this point explicitly.
5. Finally, we highly appreciate the initiative of OECD to facilitate the work in a timely manner and to reflect the consistent guidance appropriately in the Multilateral Instrument and/or its commentaries by their release for signing.

## Specific Comments

### 【Example1】

1. Commentators are invited to express their views on whether the order in which the analyses are applied under Article 9 of the MTC and the Article 7 of the MTC can affect the outcome, and what guidance should be provided on the order of application.

- As long as profits have been allocated appropriately based on the functional and factual analysis (i.e., transfer pricing approach) under Article 9, we believe that there should be no additional income attributable to PE based on the analysis under Article 7, and

therefore we request that guidance is provided, in which additional analysis of Article 7 is not needed.

- Although we understand that only comments on the methods of calculating income attributable to PE are requested, we would like to mention the following point. In Example 1, the activities conducted by Sellco seem to be just supporting activities for transactions between the non-resident manufacturer and the customer, not activities making any negotiations. In cases like this, the overall activities of Sellco should be characterized as a preparatory or auxiliary character and, therefore, does not itself constitute a DAPE.

### **【Example2】**

6. Do commentators agree with the construction of the profits or losses of the DAPE in Example 2 under the AOA?
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- We disagree with the analysis and conclusion shown in Example 2.
- In Example 2, only in the functional and factual analysis under Article 7, the economic ownerships of inventory and receivables are attributed to the DAPE due to significant people functions, and, as a result, there is inconsistency with the analysis under Article 9 where these are not attributed to Sellco.
- In this regard, both the outcomes resulted from the functional and factual analysis under Article 7 and the functional and factual analysis under Article 9 should be consistent with each other, and the inconsistency seen here should not occur. Namely, the profits of 2 which come from “Funding return from Sellco” should be attributed to Prima, and there should be no income attributable to the DAPE. Therefore, in the case of DAPE, there should be no need for further consideration due to significant people functions on the allocation of risks and economic ownership of assets.
- Yet, in this Example 2, analyses have been made due to the understanding that “the contractual assumption of risk is not aligned with control of risk”, just because of the slight changes from Example 1 in the choice of words referring to the management of inventory and credits. Even if a minor difference between the allocated risks and controlled risks could be seen in some cases, these cases should be secured so as not to be falsely recognized as being the same pattern to Example 2.
- For example, when i) the importance of inventory risks and credit risks are limited to a



certain level, or ii) Prima also holds integrated functions of managing risks and its approval is required from Sellco, before Sellco formally practices its approving function (meaning the control of risks and approval of transactions are actually made by Prima), the understanding that “the contractual assumption of risk is not aligned with control of risk” is not appropriate.

9. What are your views on the fact that in Example 2 the same functions that are considered under the Article 9 analysis to allocate risks to Sellco, are also taken into account, under Article 7, as the SPF that result in the attribution of economic ownership of assets to the DAPE? What is your opinion about the fact that, in this example, the inventory and credit risks are allocated to Sellco under Article 9 and the economic ownership of inventory and receivables are attributed to the DAPE? Does your reading of the current guidance of the 2010 Attribution of Profits Report, and in particular with paragraphs 230 to 245, support the conclusions of the Example?

- Please refer to comments on Question 6.

#### **【Example4】**

12. Do commentators agree with the construction of the profits or losses of the DAPE in Example 4 under the AOA?

- We disagree with the analysis and conclusion shown in Example 2.
- In the functional and factual analysis under Article 7 where significant people functions are focused on, the allocation of risks are undertaken in a completely different method of calculation from that in the functional and factual analysis under Article 9, which has resulted in credit risks and economic ownership of receivables being allocated additionally to the DAPE. As a result, the allocation of income between Prima and the DAPE under Article 7 turned out to be completely different from the allocation of income between Prima and Sellco under Article 9.
- In this regard, both the outcomes resulting from the functional and factual analysis under Article 7 and the functional and factual analysis under Article 9 should match, and the inconsistency seen here should not occur. Namely, the allocation of risks due to functional and factual analysis under Article 7 and the functional and factual analysis under Article 9 should be consistent with each other, and as a result, there should be no income attributable to the DAPE. Therefore, in the case of DAPE, there should be no need for further consideration due to significant people functions on the allocation of

risks and economic ownership of assets.

13. Do commentators agree that the profits or losses in the DAPE over and above the fee payable to Sellco arise because the contractual allocation of risk to Prima is respected under Article 9, and is not shared with Sellco, whereas under Article 7 the risk is partly attributed to Prima's Head Office and partly to the DAPE of Prima? In other words, the difference arises from differences between allocation of risk between two separate enterprises and attribution of risk within the same enterprise?

- Please refer to comments on Question 12.

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